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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	MM Docket No. 92-259
Cable Television Consumer	)	
Protection and Competition	)	
Act of 1992	)	
	)	
Broadcast Signal Carriage	)	
Issues	)	

TO: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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June 7, 1993

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The National Association of Broadcasters ("NAB")[1/] hereby submits its opposition to the petitions of various cable interests[2/] seeking reconsideration of the Commission's *Report and Order* in this proceeding.[3/]

I. Channel Positioning

A. Channel Positioning Rights of UHF Stations Should Not Be Modified.

In the *Report and Order*, the Commission ruled that UHF stations are entitled to exercise the same statutory right of selecting their on-channel position as

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1/ NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

2/ NAB will not attempt to address all issues raised in these petitions. Chief among those issues not addressed are pleas to delay the June 2 implementation of must carry which have now largely been rendered moot.

3/ *Cable Act Implementation: Broadcast Signal Carriage Issues*, FCC 93-144 (released March 29, 1993), 58 Fed. Reg. 17350 (April 2, 1993).

VHF stations, unless the cable operator is able to provide a "compelling technical reason for not being able to accommodate such requests."[4/]

NCTA complains that requiring on-channel carriage of UHF stations outside of a system's basic tier line-up will entail significant operational and technical problems and may, in some instances, make compliance difficult. These alleged problems, it is argued, justify a rule modification that would *never* permit a UHF station to assert its statutory on-channel rights, regardless of how little a burden compliance would impose on the cable operator, if its channel position were not within the cable system's basic tier.

In its Reply Comments, NAB explained, at length, why such a result would be contrary to the Cable Act.[5/] First, the Act creates an absolute right for stations to elect their on-channel position, makes no distinction between VHF and UHF stations, and provides no "technical difficulty" exception.[6/] Second, there is clearly no basis for limiting a station's channel selection to a cable system's basic tier which could, in turn, be manipulated precisely for the purpose of limiting stations' channel selection options. This is particularly true as applied to UHF independent stations which historically have been the subject of cable's most abusive channel positioning practices. Third, NCTA continues to provide no argument to contradict

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4/ R&O at ¶ 91

5/ NAB Reply Comments in MM Docket No. 92-259 filed January 19, 1993 (hereafter NAB Reply Comments) at pp. 19-22.

6/ In this regard, the Commission is being generous in creating, by rule, such an exception.

the common sense notion that few, if any, UHF stations will insist on carriage on a high on-channel position far removed from other stations' channel positions.[7/]

Finally, if, as NCTA so strenuously argues, carriage of UHF stations on-channel will indeed pose extraordinary burdens, cable systems should have no problem making the showing required by the Commission to obtain a waiver. While NCTA complains that the standard for obtaining such waivers is "high," it fails totally to explain why, or to propose and justify any alternative standard.

B. Conflicting Channel Claims Should Not be Resolved By The Cable Operator.

For the reasons set forth at pages 26 through 29 of NAB's Comments, and pages 18 and 19 of NAB's Reply Comments in this proceeding, CATA's proposal that the cable operator resolve any conflicting channel disputes should be rejected. The Act clearly intended that broadcasters seek to resolve such conflicts in the first instance, and that the Commission be the arbitrator of any unresolved disputes.

CATA is incorrect in asserting that the Act provides only one channel positioning option to stations not previously carried. A second option is a position mutually agreed upon with the cable operator.

NAB agrees with CATA that the channel position of stations failing to make an election should be left to the discretion of the cable operator, with the important proviso that such discretion be limited to the station's statutory options.

7/ The Commission correctly anticipates that it "will rarely be called upon to resolve...disputes" where a UHF station would demand such far removed carriage. *R&O at ¶ 91 n. 280.*

II. Attempt To Limit Cable's Carriage Obligations By Reference To The Program Exclusivity Rules, Or To Limit Stations' Rights To Enforce Those Rules Should Be Rejected.

Cable interests filing in response to the *Notice of Proposed Rule Making* in this proceeding argued that stations' program exclusivity rights should be

or, at least, if one station had syndex rights that could be exercised against another station with respect to just one program, those stations would be deemed to "substantially duplicate" each other, and the station whose one program had to be deleted would not have to be carried by a cable operator.

Such a result clearly would be contrary to the Act. Moreover, the hypothetical NCTA provides does nothing to support its proposed modification to the "substantial duplication" definition and, accordingly it should be rejected.

Congress intended "substantial duplication" to refer to the "simultaneous transmission of identical programming on two stations," and which "constitutes a majority of the programming on each station."[10/] As NCTA correctly points out, this relatively narrowly defined exception to cable's must carry requirements, which was intended to provide operators with a measure of discretion and enhance subscriber viewing options, bears no relation to the more expansive protection provided to local stations under the program exclusivity rules, which were designed to level the competitive playing field, and to permit stations to enforce contractual programming rights. While Congress clearly intended that such rights should affect neither the carriage of stations asserting them, nor the carriage of stations against which such rights are asserted,[11/] adoption of NCTA's modified definition would permit cable operators not to carry any station against which syndex

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[10/] H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) ("House Report") at 94; R&O at ¶ 60.

[11/] *See* S. Rep. No. 92, 102d Cong. 1st Sess. (1992) ("Senate Report") at 38; Cable Act, Secs. 614(b)(3)B) and 615(F).

rights applied. Had Congress wanted to equate "substantial duplication" in the statute with the duplication policies applied by the Commission under its syndex rules it could easily have done so. It did not.

NCTA's specific objection to the Commission's "substantial duplication" definition is that, when combined with the syndex rules, cable operators will have to carry "duplicative," stations, then delete the programs that are duplicative, with the result that operators will be required to carry signals with "black holes," instead of cable programming services not subject to syndex deletions. This was, of course, precisely the objection the Commission rejected in adopting the syndex rules. The simple answer to NCTA's quandary is that cable operators insert

interests,[15/] persist in their efforts to obtain rule modifications that would allow cable operators simply to ignore an affiliate's legitimate efforts to negotiate for consent by negotiating with a more distant affiliate of the same network. These renewed efforts contain no novel justification, and NAB has repeatedly demonstrated why this result would be contrary to the Act, would undermine localism, and would inhibit the ability of networks to control the distribution of their programming.[16/]

would bar it from importing a Connecticut affiliate of the same network that Connecticut residents and government officials prefer is inaccurate and misleading. Presumably it is the *local* Connecticut oriented programming that makes the Connecticut affiliate more desirable, and nothing in the non-duplication rules prevents Cablevision from importing this non-network programming. While in some rare instances, waivers of application of the nonduplication rules may be justified, Cablevision's petition, based at this point on pure speculation, fails even to warrant consideration of such a waiver much less to provide a basis for the sweeping rule modification it proposes.

III. Subject To The Program Exclusivity Rules, The Signals Of All Stations Must Be Carried In Their Entirety.

A number of cable interests challenge the Commission's determination that the signals of broadcast stations retransmitted pursuant to retransmission consent must be carried in their entirety, and NCTA contests the finding that retransmission consent stations retain certain other Section 614 rights.[19/] For the reasons set forth in NAB's Comments at pages 46 through 49, we believe the Commission correctly resolved this issue in accordance with the directives of the Act. A specific objection raised to requiring carriage of the entire signal of a retransmission consent station is that it will preclude carriage of network programming from a distant affiliate that the local affiliate may choose to preempt. The Commission's rules already provide a partial solution to this situation by

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[19/] *See e.g.*, Petitions of NCTA and Newhouse Broadcasting.

assuring that any other station in the local market (which the cable operator presumably would be carrying) has the opportunity to carry the preempted program. *See* 73.658(a)(b). Moreover, at most the objection calls for a narrowly tailored exception to, rather than abandonment of the entire signal requirement.

IV. The Act Allows For No Distinction Between Commercial and Residential Subscribers.

As articulated in an earlier NAB pleading in this proceeding,[20/] Section 614(b)(7) provides absolutely no basis for allowing cable operators to delete any must carry signals from service rendered to commercial subscribers.

NCTA's two justifications from negating this clear and unequivocal statutory language are that commercial subscribers are more "sophisticated buyers of video programming services" and that it is unfair to require cable to provide all must carry signals to commercial subscribers when competing multichannel video distributors do not share this obligation.[21/] Neither of these justifications are persuasive.

While there undoubtedly are some large commercial subscribers that are sophisticated buyers of video services, there are many other commercial subscribers that undoubtedly are not. The same differing levels of sophistication exist among residential subscribers. Moreover, the issue is not the sophistication of one or another commercial entity, but rather of access to local stations by viewers

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[20/] NAB Reply Comments at p. 10.

[21/] NCTA Petition at 16.

who watch the televisions provided by commercial subscribers. With respect to the non-applicability of must carry to multichannel video providers other then cable, the same distinction exists between these providers and cable in the residential market. Cable's monopoly position and past abusive practices clearly justify these differing obligations as applied both to commercial and residential subscribers.

Respectfully submitted,

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